88-1237

FILED
DEC 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

in the

Supreme Court

of the

United States

October Term, 1988

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

against

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN E. HERNDON, JR.
MICHAEL E. WARGO
Of Counsel

HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER
Attorneys for Appellant
200 South Biscayne Boulevard
Suite 3500
Southeast Financial Center
Miami, Florida 33131
(305) 358-7747

64 pp

PETITION FOR WRIT OF CERTIORARI

COMES NOW, TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY, the Petitioner herein (hereinafter referred to as "Petitioner"), by and through its undersigned counsel, and files this its Petition for Writ of Certiorari:

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals erred in vacating the Judgment of the District Court and in remanding the cause to the District Court with directions to dismiss the action upon a holding that there was no case or controversy between the parties and thus, that the trial court was without jurisdiction to settle the declaratory judgment actions where the dispute was between two diverse group health insurers to determine which of the two was liable to pay the medical expenses of a group insured, where it was undisputed that one of the two insurers was liable, the amount of submitted claims exceeded $10,000.00, and the parties were uncertain as to their rights under the Florida Extension of Benefits Statutes and the policies of insurance issued by them?

LIST OF ALL PARTIES

All parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed are listed in the caption. Transamerica-Occidental Life Insurance Company will be referred to as "Petitioner" and Provident Life & Accident Insurance Company will be referred to as "Respondent". A list of all Parent Companies, Affiliates, and Non-Wholly Owned Subsidiaries can be found at page App. A(iv)-25.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ..	i
LIST OF ALL PARTIES.....	i
A. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS	2
B. CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
i. DATE OF THE JUDGMENT.....	2
ii. DATE OF ORDER ON REHEARING	2
iii. STATUTORY PROVISION CONFERRING JURISDICTION ON THE SUPREME COURT OF THE UNITED STATES	2
C. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS THAT THE CASE INVOLVES.....	2
D. STATEMENT OF THE CASE	7
E. ARGUMENT FOR ALLOWANCE OF THE WRIT	10

TABLE OF CONTENTS (Continued)

PAGE

F. APPENDIX

(i) Copies of any opinions, orders, findings of facts, and conclusions of law, delivered upon the rendering of the Judgment by the Court whose decision is sought to be reviewed.

(a) Opinion of the Eleventh Circuit Court of Appeals rendered August 1, 1988 entitled Provident Life & Accident Insurance Company vs. Transamerica-Occidental Life Insurance Company, Case No. 87-5526 ..... App. A(i)-1

(ii) Copies of any other such opinions, orders, findings of facts, and conclusions of law rendered by Courts in this case.

a. Transcript of findings of facts and conclusions of law before the Honorable Norman C. Roettger, Jr. ..... App. A(ii)-1

(iii) Copy of Judgment appealed from and Order on Rehearing.

a. Judgment appealed from ..... App. A(iii)-1

b. Order denying Petition for Rehearing ..... App. A(iii)-2

TABLE OF CONTENTS (Continued)

PAGE

(iv) Other appended materials

a. Supplemental Brief of Appellant, Provident Life & Accident Insurance Company (on jurisdiction) ..... App. A(iv)-1

b. Supplemental Brief on Jurisdiction of Appellee/Cross Appellant ..... App. A(iv)-8

c. Petition for Rehearing and/or Clarification ..... App. A(iv)-19

d. List of All Parent Companies, Affiliates, and Non-Wholly Owned Subsidiaries ..... App. A(iv)-25

TABLE OF AUTHORITIES

	PAGES
U.S. Const. Art. III, § 2, cl 1	2
28 U.S.C.A. § 1254	2
28 U.S.C.A. § 1332	7
28 U.S.C.A. § 2201	3, 7
Section 627.6651, Fla. Stat.	3
Section 627.666, Fla. Stat.	3
Section 627.667, Fla. Stat.	6
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945)	12
Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972)	12
United Services Auto Association v. Royal-Globe Insurance Company, 511 F.2d 1094 (10th Cir. 1975)	8, 10

CASE NO.

in the

Supreme Court

of the

United States

October Term, 1988

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

against

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

A. REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS

A copy of the Opinion of the Eleventh Circuit Court of Appeals sought to be reviewed is attached hereto at page App. A(i)1.

B. STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Date of the Judgment.

The Judgment of the Eleventh Circuit Court of Appeals was entered August 1, 1988.

(ii) Date of Order denying Petitioner's Petition for Rehearing.

The Order denying Petitioner's Petition for Rehearing was dated September 26, 1988.

(iii) Statutory provision conferring jurisdiction on the Supreme Court of the United States.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254(a).

C. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS THAT THIS CASE INVOLVES

(i) U.S. Const. Art. III, § 2, cl. 1.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the State claiming Lands under Grants of different States,

and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(ii) **28 U.S.C.A. § 2201. Creation of remedy.**

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under Section 7428 of the Internal Revenue Code of 1954 or a proceeding under Section 505 or 1146 of title 11, any Court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see Section 505 of the Federal Food, Drug, and Cosmetic Act.

(iii) **Section 627.6651, Fla. Stat. (1986).**

Replacement or termination of group, blanket, or franchise health policy or contract; liability of prior insurer.—When a purchaser of insurance terminates or replaces an existing group, blanket, or franchise health insurance policy or contract with another such policy, the prior insurer shall remain liable only to the extent of its accrued liabilities and extensions of benefits as required by s. 627.667.

(iv) **Section 627.666, Fla. Stat. (1986).**

Liability of succeeding insurer.—

(1) Each person who is eligible for coverage in accordance with the succeeding insurer's plans of benefits shall be covered by that insurer's plan of benefits upon payment of the applicable premium.

(2) Each person not covered under the succeeding insurer's plan shall, upon payment of a premium equivalent

to that which would have been paid if such person had been eligible for coverage, be covered by the succeeding insurer in accordance with the following provisions if such individual was validly covered, including continuance of the prior plan on the date of discontinuance of the prior plan and if such individual is a member of the class of individuals eligible for coverage under the succeeding insurer's plan.

(a) The minimum level of benefits to be provided by the succeeding insurer shall be the applicable level of benefits of the prior insurer's plan reduced by any benefits payable by the prior plan.

(b) Coverage shall be provided by the succeeding insurer until at least the earlier of the following dates:

1. The date the individual becomes eligible under the succeeding insurer's plan.

2. The date the individual's coverage would terminate in accordance with the succeeding insurer's plan provisions applicable to individual termination of coverage.

3. In the case of an individual who was totally disabled immediately prior to the date of the succeeding insurer's coverage became effective, the end of any period of extension or accrued liability required of the prior insurer under s. 627.667, if applicable, or the end of any period of extension or accrued liability which would have been required had s. 627.667 been applicable.

(c) In the event that the eligible class provides for dependent children, a limiting age shall not waive the succeeding insurer's liability to handicapped children who met the criteria of s. 627.6615 with the prior carrier and continue to meet those criteria.

(3) If the succeeding insurer's plan contains a "pre-existing conditions" clause, the level of benefits under the clause shall be the lesser of:

(a) The benefits of the succeeding insurer's plan determined without application of the pre-existing conditions limitation; or

(b) The benefits of the prior plan.

(4) The succeeding insurer, in applying any deductible or waiting period in its plan, shall give credit for the satisfaction or partial satisfaction of the same or similar provisions under a prior plan. As to deductible provisions, the credit shall apply for expenses actually incurred and applied against the deductible provisions of the prior insurer's plan during the 90 days preceding the effective date of the succeeding insurer's plan, but only to the extent these expenses are recognized under the terms of the succeeding insurer's plan and are subject to a similar deductible provision.

(5) In any situation in which a determination of the prior insurer's benefit is required by the succeeding insurer, the prior insurer shall, at the succeeding insurer's request, furnish a statement of the benefits available or pertinent information sufficient to permit verification of the benefit determination, or the determination itself, by the succeeding insurer. For the purpose of this section, benefits of the prior plan will be determined in accordance with all of the definitions, conditions, and covered expense provisions of the prior plan rather than those of the succeeding plan. The benefit determination will be made as if coverage had not been replaced by the succeeding insurer.

(6) The provisions of this section also apply upon the issuance of an insurance policy to a group whose benefits had been previously self-insured or to a self-insurer providing coverage to a group who had been previously covered by an insurer or another self-insurer.

(v) Section 627.667, Fla. Stat. (1986).

Extension of benefits.—

(1) Every group, blanket, or franchise policy or contract renewed, delivered, or issued for delivery in this state shall contain a reasonable provision for extension of benefits in the event of total disability at the date of discontinuance of the policy or contract. The extension shall be required whether the group policyholder or other entity secures replacement coverage from a new insurer or forgoes the provision of coverage.

(2) Discontinuance of the policy during a disability shall have no effect on benefits payable for that disability or confinement under a group plan providing benefits for loss of time from work or specific indemnity during hospital confinement.

(3) In the case of hospital or medical expense coverage other than for dental and maternity expense, a reasonable extension-of-benefits or accrued liability provision is required, which provides for continuation of policy benefits in connection with the treatment of a specific accident or illness incurred while the policy was in effect. Such provision will be considered reasonable if it provides an extension of at least 12 months under "major medical" and "comprehensive medical" types of coverage and, under other types of hospital or medical expense coverage, provides either an extension of at least 90 days starting with a specific event which occurred while coverage was in force.

(4) Any applicable extension of benefits or accrued liability shall be described in any policy or contract involved as well as in group insurance certificates. The benefits payable during any period of extension or accrued liability may be subject to the regular benefit limits of the policy or contract.

(5) This section also applies to holders of group certificates which are renewed, delivered, or issued for delivery to residents of this state under group policies effectuated or delivered outside this state, unless a succeeding carrier under a group policy has agreed to assume liability for such benefits.

D. STATEMENT OF THE CASE

Pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201 *et seq.*, the Respondent, Provident Life & Accident Insurance Company, sued the Petitioner, Transamerica-Occidental Life Insurance Company for a declaratory decree as to its rights and liabilities under the Florida statutory extension of benefits insurance provisions and under its particular policy of insurance. The Petitioner counterclaimed against the Respondent under the Federal Declaratory Judgment Act, seeking a declaration that the benefit monies paid by it on behalf of a group insured, should have been paid by the Respondent pursuant to their respective policy provisions and the Florida statutory extension of benefits insurance provisions. Jurisdiction in the United States District Court for the Southern District of Florida was invoked pursuant to 28 U.S.C.A. § 1332.

After a non-jury trial on the merits, the Honorable Norman C. Roettger, Jr. of the United States District Court for the Southern District of Florida, entered a Judgment for the Petitioner and against the Respondent herein. Thereafter, the Respondent herein filed its appeal with the Eleventh Circuit Court of Appeals. The matter was fully briefed, and at the oral argument on this cause, the panel from the Eleventh Circuit Court of Appeals, for the first time, *sua sponte*, raised the issue of the trial court's jurisdiction. The panel requested jurisdictional briefs from both parties, and after reviewing those briefs, rendered its opinion on August 1, 1988. That decision vacated the Judgment of the United States District Court for the Southern District of Florida and remanded the cause to that court with directions to dismiss

the action for want of jurisdiction. The Eleventh Circuit Court of Appeals held that there was no case or controversy between the parties and that, as such, the District Court was without jurisdiction to settle the dispute. However, that Court acknowledged that the Petitioner cited convincing authority to support the District Court's jurisdiction, to wit: *United Services Auto Ass'n v. Royal-Globe Insurance Co.*, 511 F.2d 1094 (10th Cir. 1975). *See* opinion on page App. A(i)1, 8.

On August 19, 1988, the Petitioner herein filed a Petition for Rehearing and/or Clarification. That Petition was based on the Petitioner's contention that the Eleventh Circuit Court of Appeals based its opinion on the jurisdictional brief filed on behalf of the Respondent herein, that there was indeed an agreement between the parties and co-existing duties between the parties, and thus that the trial court did have jurisdiction over the dispute. By Order dated September 26, 1988, the Petitioner's Petition for Rehearing was denied.

This dispute centers around which of two diverse group health insurers was liable to pay the medical expenses of a group insured where it was undisputed that one of the two insurers was liable and the parties were uncertain as to their rights under the Florida statutory extension of benefits statutes and the policies of insurance issued by them.

Mr. David Wall was a vice-president of the Harlon Group, formerly known as HLR. Mr. Wall was diagnosed as having cancer and because of that illness and its treatment, did not return to work after May 17, 1982. Mr. Wall died on December 18, 1983, never having returned to his place of employ, the Harlon Group, after May 17, 1982, except on one occasion when he attended a deposition. Mr. Wall was paid a salary from May 17, 1982 until December 31, 1982, as a good will gesture by his employer, Harlon. Mr. Wall also received during this time a $150.00 disability payment being made by the short term disability carrier, the Respondent herein. After December 31, 1982, until Mr. Wall's death, Mr. Wall received only disability payments from Harlon's long

term disability carrier, North American, not a party to these actions.

The Respondent herein issued a policy of group insurance, effective December 1, 1978, to Harlon. That policy was cancelled on April 30, 1983 and contained an extended benefits provision providing for an extension of benefits to an insured in the event of total disability on the date of termination of the policy. Furthermore, that policy defined total disability as being "unable to perform every duty of [an insured's] occupation or employment for salary or wages". Through 1982, although Mr. Wall never returned to his place of employment, Harlon would send him checks and correspondence because Harlon "wanted to keep Wall feeling that he was part of the company".

After that policy was cancelled on April 30, 1983, Harlon obtained TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY (the Petitioner herein) policy No. 2341LDACZY, as a replacement, effective May 1, 1983. This policy provided as follows: "If you are not actively at work on the date your insurance would otherwise start, it will not start until the date you return to active work." Furthermore, that policy defined "active work" or "actively at work" as meaning being on the job, as required of a full time employee. "Full time employee" means an employee who at a place other than his or her residence works a full schedule work week of at least thirty (30) hours for the policyholder.

A Mr. Raymond Cafarelli was the insurance broker for the Harlon Group. The Petitioner corresponded with Mr. Cafarelli, both before and after the effective date of its policy. Pursuant to an April 18, 1983, letter, the Petitioner agreed as follows:

> This letter is to advise you that in the event that Transamerica-Occidental is selected as the insurance carrier for the Harlon Group, the following will apply to any totally disabled employee.

> *As long as there is no extension of benefits under the former carrier*, Transamerica-Occidental will continue to provide benefits for a totally disabled employee for a period of twelve months. (emphasis supplied).

The second letter, dated June 2, 1983, provided:

> Please be advised that David Wall and his family are covered under the Harlon Group policy with us effective May 1, 1983. Even though Mr. Wall is *[sic]* totally disabled on our effective date, due to the takeover provisions of the policy, we will continue to provide full benefits for him and his dependents as long as the required premium is paid.

The Petitioner commenced payment of Mr. Wall's medical claims relative to his treatment for cancer. The Respondent had denied Mr. Wall's claims on the ground that Wall was an active employee on the date that its coverage terminated, notwithstanding the fact that that insurer had paid disability benefits to Mr. Wall. When the Appellee refused to pay the claims after demand by the Petitioner, this litigation commenced with the Respondent filing a suit for Declaratory Decree against the Petitioner, and that insurer subsequently counterclaiming for the post May 1, 1983, benefits paid to Mr. Wall.

E. ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The decision of the Eleventh Circuit Court of Appeals in the instant case is in direct conflict with a decision of the Tenth Circuit Court of Appeals, to wit: *United Services Automobile Ass'n v. Royal-Globe Insurance Co.*, 511 F.2d 1094 (10th Cir. 1975). In *Royal-Globe*, an insurer of a rental car driver brought a claim for declaratory judgment against the insurer of a rental car company seeking a declaration that the insurance policy of the rental car company covered the driver's liability. The injured party was not joined, nor were the insured's under any of the two insurance policies. The

parties agreed that one of the two policies were applicable. In affirming a judgment in favor of the driver's insurer, the Court remarked on the standing issue:

> "At the outset on this Appeal, Royal challenges USAA's standing to bring this action. Apparently, this contention was not made at the trial court, and the trial court's findings of fact state as an admitted fact "this court has jurisdiction of this proceeding." Pointing out that USAA is not a direct beneficiary of the rental contract, Royal invokes the settled and familiar rule that an action by a third party to enforce a contract may be brought only when the third party is a direct beneficiary of the contract. *See Hawkins v. Mattes*, 171 Okl. 186, 41 P.2d 880 (1935); *Traders & General Insurance Co. v. Sand Springs Home*, 195 Okl. 509, 158 P.2d 1018 (1944); *Neal v. Neal*, 250 F.2d 885 (10th Cir. 1957). We do not think this rule applicable here, simply because this action is not one to enforce a contract but rather seeks a declaration of the relative rights and duties of USAA and Royal. The subject matter of this suit—the duty to defend and indemnify Friloux in the pending Texas lawsuit—is definite and substantial. Each party has a stake in the outcome, and their interests are adverse. We conclude that USAA has standing to bring this declaratory suit."

511 F.2d at 1096.

In the present case, the same scenario is presented, except that group health benefits are at issue instead of benefits under an automobile insurance policy. The "relative rights and duties" of both parties hereto were at issue and the parties both rightfully invoked the remedies that the Federal Declaratory Judgment Act offers parties who can invoke the jurisdiction of the Court.

The declaratory judgment statute itself provides that there must be an "actual controversy" for the courts to declare the "rights and relations" of the parties seeking such a declaration. Here, the court was not presented with a request for an advisory opinion, nor was the Court asked to decide the case, based upon abstract, hypothetical, or contingent questions. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

> "A justiciable controversy exists where the Plaintiffs with a personal stake and interests are a raid against persons with adverse legal interests in a sufficiently immediate adversary context to warrant declaratory relief."

Poe v. Menghini, 339 F. Supp. 986, 990 (D. Kan. 1972).

The parties hereto interests all arose out of the extension of benefits provision of the Florida Insurance Code, correspondence between them, and their respective duties arising out of their policies of insurance. They both were entitled to seek the remedies of the Declaratory Judgment Act, both parties hereto had co-existing duties under their policies of insurance to pay insurance benefits to the Wall family under their respective group policies issued to the Harlon Group. The Respondent herein, pursuant to its policy provisions and the Florida extension of benefits insurance provisions, had a duty to provide benefits to Mr. Wall, who was found by the trial court to have been totally disabled on the date of take over by the succeeding insurer, the Petitioner herein, of the insurance coverage. The Petitioner had the duty to provide insurance coverage to Mr. Wall's dependents as of the date of takeover and pursuant to its policy provisions.

The parties hereto had an agreement between them, memorialized in a letter dated April 18, 1983, referred to in the Statement of the Case, to the effect that the Petitioner herein would continue to provide benefits for a totally

disabled employee of the Harlon Group for a period of twelve months, as long as there was no extension of benefits applicable to the prior carrier, the Respondent herein. Since the Respondent herein breached this agreement by failing to provide the extension of benefits required by the Florida Statutes, a "controversy" between the parties did exist.

The opinion of the Eleventh Circuit Court of Appeals sends a message to the insurance industry in the United States that in a situation where two insurers are uncertain as to which of them is liable to pay benefits to an insured, the better course to follow is for each to deny the insured's claims and file suit against the insured for Declaratory Relief. It is submitted that in this very litigious society, the truly better course to follow is the one followed by the Petitioner insurer in this action, to wit: to pay the insured, or the health care providers on his behalf, the benefits which he/they are due under one or both policies of insurance and then to resolve the dispute as to which of the two insurers is liable for those benefits between themselves rather than to prejudice the rights of the innocent insured.

Because the opinion of the Eleventh Circuit Court of Appeals under consideration in this Writ is in direct conflict with a decision of the Tenth Circuit Court of Appeals, *United Services Auto Ass'n v. Royal-Globe Insurance Co.*, 511 F.2d 1094 (10th Cir. 1975), it is the Petitioner's contention that a Writ of Certiorari should issue.

Respectfully submitted,

HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER
Counsel for Petitioner
200 South Biscayne Boulevard
Suite 3500
Southeast Financial Center
Miami, Florida 33131
(305) 358-7747

Of Counsel:

JOHN E. HERNDON, JR.
MICHAEL E. WARGO

Appendix

APPENDIX A(i)

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Plaintiff-Appellant, Cross-Appellee,

v.

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

No. 87-5526.

United States Court of Appeals, Eleventh Circuit.

Aug. 1, 1988.

Original medical insurer brought declaratory judgment action against subsequent insurer asking for determination of which insurer was liable for insured's medical expenses. The United States District Court for the Southern District of Florida, No. 84-6342 Civ-NCR, Norman C. Roettger, Jr., J., held original insurer to be liable, and original insurer appealed. The Court of Appeals, Walter E. Hoffman, Senior District Judge, sitting by designation, held that no case or controversy existed between parties, and federal district court thus did not have jurisdiction to hear action, where insured was not named as party, and there was no legal relationship between parties on which to base liability.

Vacated and remanded.

Federal Courts —13

No case or controversy existed between medical insurers, and federal district court thus did not have jurisdiction to hear original insurer's action against subsequent insurer for declaratory judgment to determine which insurer was liable for medical expenses; insured was not named in action, and there was no legal relationship between parties on which to

base liability. U.S.C.A. Const. Art. 3, § 2; 28 U.S. C.A. § 2201 et seq.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

WALTER E. HOFFMAN, Senior District Judge:

Provident Life and Accident Co. (Provident) brought a declaratory judgment action against Transamerica-Occidental Life Insurance Co. (Transamerica) asking the court to determine which of the two insurance carriers is liable for the medical expenses of David Wall incurred after April 30, 1983. Provident issued a group policy to Wall's employer, Harlon, effective December 1, 1978. The policy contains a provision extending benefits for one year beyond the termination of the policy if the employee covered by the policy is totally disabled on the date the policy terminates. Provident's policy with Harlon terminated on April 30, 1983, at which time a group policy issued to Harlon by Transamerica took effect.

Early in 1982, Wall discovered that he had cancer. The record suggests that, while he did not return to work after May 17, 1982, Wall continued to take part in Harlon's business. In letters to Harlon's insurance broker, Transamerica agreed to provide benefits to Wall and his family "as long as there is no extension of benefits under the former carrier." In a letter dated June 7, 1983, Transamerica advised Harlon's insurance broker:

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

> David Wall and his family are covered under the Harlon Group Policy with [Transamerica] effective May 1, 1983. Even though Mr. Wall was totally disabled on our effective date, due to the takeover provisions of the policy, we will continue to provide full benefits for him and his dependents as long as the required premium is paid.

Transamerica paid benefits to Wall through the fall of 1983. Then, according to supplemental briefs submitted by the parties, Harlon's insurance broker began complaining about the premiums due under Harlon's policy with Transamerica. By this time, Transamerica had paid benefits to Wall in the amount of $37,000.00. These payments were adversely affecting Harlon's premiums. The broker apparently wanted Transamerica to shift the liability for Wall's medical expenses to Provident pursuat to the "Extension of Benefits" provision in Provident's policy with Harlon in order to reduce Harlon's current premiums. According to both parties, in order to appease the broker, Transamerica requested and received a formal denial of liability from Provident for Wall's expenses incurred after April 30, 1983.[1] In February of 1984, soon after the formal denial of liability, Transamerica determined that it was not responsible for Wall's medical bills and asked Provident to reconsider its denial of liability. Provident refused and filed an action for declaratory judgment to determine which insurer is liable for Wall's medical expenses.

The United States District Court for the Southern District of Florida determined that the only issue in the case was whether Wall was totally disabled on April 30, 1983 when Provident's policy terminated. Under the court's rationale, if Wall was totally disabled, then he was covered under the extension of benefits provision in Provident's policy and the responsibility for his medical expenses falls on Provident; on

---

[1]Wall died on December 18, 1983.

the other hand, if Wall was not totally disabled, then he was covered under Transamerica's policy and thus the responsibility for his medical expenses remains with Transamerica. The court found that Wall was totally disabled on April 30, 1983 and therefore concluded as a matter of law that "the loss must fall upon Provident."[2] Provident appealed the district court's ruling.

At oral argument, we asked both parties to explain to the court the "case or controversey" giving rise to subject matter jurisdiction in this action.[3] Because neither party explained the "case or controversy" to the court's satisfaction, we ordered the attorneys to brief the issue. After reading the briefs, we have concluded that no case or controversy exists between these parties. Consequently, the district court did not have jurisdiction to hear the action and we must vacate the lower court's judgment.

Article III, section two of the Constitution limits the exercise of judicial power to "cases" and "controversies." The declaratory judgment act, in its reference to " 'cases of actual controversy' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937). Congress did not broaden the jurisdiction of the federal courts via the declaratory judgment act, but rather provided a new procedural device for handling

---

[2]On June 4, 1987 the district court entered a judgment in favor of Transamerica for $111,794.20, of which $25,785.86 is prejudgment interest. In the supplemental brief, Transamerica claims it has paid over $85,000.00 on Wall's claims. Neither the record nor the briefs make clear when these expenses were incurred. However, in light of our ruling on the issue of jurisdiction, the exact date that Transamerica paid these claims is irrelevant.

[3]At the trial below, neither party raised the issue of the court's jurisdiction in this case. The parties' failure to address the issue, however, does not "preclude this court from uncovering fatal jurisdictional defects." *Travelers Indemnity Co. v. Standard Accident Insurance Co.*, 329 F.2d 329, 330 (7th Cir. 1964).

controversies over which the courts already have jurisdiction. Id. at 240, 57 S.Ct. at 463; *First Federal Savings and Loan Ass'n of Lake Worth v. Brown*, 707 F.2d 1217, 1220 (11th Cir. 1983). Thus, the declaratory judgment action "affects exclusively matters of practice, pleadings and forms and modes of proceedings." Borchard, *Declaratory Judgments* 231 (2d ed 1941). The Act does not affect requirements for the exercise of federal jurisdiction. *First Federal v. Brown*, 707 F.2d at 1220; *Seibert v. Baptist*, 594 F.2d 423, 428 (5th Cir.), *rev'd on other grounds*, 599 F.2d 743 (1979). Since the jurisdictional limits under the declaratory judgment act mirror those found int he Constitution, this court does not have subject matter jurisdiction over the issue presented unless the issue is a "case or controversy."

The Supreme Court in *Aetna v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), explained the case or controversy requirement for federal jurisdiction:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-41, 57 S.Ct. at 463-64. (citations omitted). Courts have found the case or controversy requirement lacking when the plaintiff has no interest in the case, when the defendant has no interest in the case, when no conflict exists in the case, when there is no adverse claimant, when there is no conflict in the case because of a defect in the parties and when there is no legal relationship between the parties. *See*, Borchard, *Declaratory Judgments* 30 n. 18. At least two of the defects listed above are present in the instant case.

First, there is a defect in the parties to this action. Instead of bringing an action to determine the rights and obligations

between the insurance company and the insured,[4] Provident brought a declaratory judgment action against Transamerica, the other insurance company. The controversy over whether Transamerica wrongly paid benefits to Wall is not between Transamerica and Provident, but between Transamerica and Wall. Consequently, Transamerica's failure to name Wall (or Wall's estate) in this action leaves no case or controversy on which to base jurisdiction. *See Travelers Indemnity Co. v. Standard Accident Insurance Co.* 329 F.2d 329, 330 (7th Cir. 1964) (action between two insurers to establish liability not "substantial controversy between parties having adverse legal interest").

Second, the court lacks jurisdiction in this action because there is no legal relationship between the parties on which to base liability. In oral argument, Judge Vance asked the telling question "If you were pleading this case under common law pleading what label would you put on your cause of action?" Neither party presented a satisfactory answer at oral argument or in their supplemental briefs. While there is a legal relationship between Provident and Wall and between Transamerica and Wall, there is no legal relationship between the two insurers. Consequently, there is no basis on which to rule either party liable to the other.

Both Provident and Transamerica cite several cases to support the court's jurisdiction over this matter. First, Provident cites *Continental Casualty Co. v. Employers Commercial Union Insurance Co.*, 476 F.2d 782 (8th Cir. 1973), to support the proposition that courts prefer insurers to pay the insured, and then argue over which insurer is liable. While Provident correctly interprets the Eighth Circuit's goal in *Continental Casualty*, Provident ignores the proper procedure for acccomplishing the goal. Insurers may

---

[4]In the typical declaratory judgment action, the insurer brings an action against the *insured* to establish nonliability. *See* 20 Appleman, *Insurance Law and Practice* § 11354 n. 7 and cases cited therein.

provide benefits to their insured while reserving the right to proceed against other insurers that may be liable to the insured. This procedure was properly used in *Allstate Insurance Co. v. Employers Liability Assurance Corp.*, 445 F.2d 1278 (5th Cir. 1971), also cited by Provident to support the court's jurisdiction. In *Allstate Insurance*, the court decided the issue of whether an insurer's "voluntary payment, although accompanied by a full reservation of rights by the payors as between themselves nevertheles operat[ed] to extinguish the right of the parties to invoke federal declaratory jurisdiction." *Id.* at 1281. The Fifth Circuit held that the insurer's "unambiguous agreement with each other clearly evinces their intention to reserve and not to forego a later adversary determination of their respective rights and liabilities." *Id.* In the instant case, Provident and Transamerica entered no such agreement. Indeed, the record shows that the two companies did not dispute Transamerica's liability until after Wall's death. In *Allstate Insurance*, the parties brought a declaratory judgment action based on the reservation of rights agreement. In the instant case, as no such agreement exists, no legal relationship exists on which to bring an action.

In *Industrial Underwriters Insurance Co. v. P & A Construction Co.*, 382 F.2d 313 (10th Cir. 1967), also cited by Provident, the court found jurisdiction to resolve a dispute between two insurers in a declaratory judgment action even though "there was no privity between them and the obligation of each was to their common insured and not to the other." *Id.* at 315. However, in *Industrial Underwriters*, the insured was named as a party to the action. Thus, even though no legal relationship existed between the insurers, there was a controversy between the plaintiff insurer and the defendant insured. In the instant case, Wall, the insured, was never named as a party to the action. Furthermore, Wall had no incentive to join the action since Transamerica never refused to provide benefits. Since Wall was not named, no controversy exists between the remaining insurers. In short,

authority cited by Provident to support the court's jurisdiction in this matter is easily distinguishable. Transamerica, on the other hand, presents much more convincing authority to support the court's jurisdiction.[5] Transamerica cites *United Services Auto Association v. Royal-Globe Insurance Company*, 511 F.2d 1094 (10th Cir. 1975), in which the insurer of the driver of a rented car brought a declaratory action to establish that the insurer of the rental company was responsible to defend and indemnify the driver in a suit arising out of an accident involving the driver. The district court ruled against the rental company's insurer, and the insurer appealed challenging the other company's standing to bring the suit. To support its challenge, the appellant cited "the settled and familiar rule that an action by a third party to enforce a contract may be brought only when the third party is a direct beneficiary of the contract." *Id.* at 1096 (citations omitted). Finding that it had jurisdiction, the court said:

> We do not think this rule applicable here, simply because this action is not one to enforce a contract but rather seeks a declaration of the relative rights and duties of [the two insurers]. The subject matter of this suit—the duty to defend and indemnify [the driver] in the pending . . . lawsuit—is definite and substantial. Each party has a stake in the outcome, and their interests are adverse. We conclude that [the insurer] has standing to bring this declaratory action.

Id. at 1096.

To the extent that the court in *United Services* found a case or controversy between the two insurers, we must disagree. As in the instant case, no legal relationship existed

---

[5]Since Provident lost in the trial below, Provident will benefit from a vacation of the district court's ruling. This may explain Provident's unpersuasive authority concerning the court's jurisdiction.

between the insurers. Had the insurers jointed the insured in their action, a definite and substantial controversy would exist, as the declaratory judgment action would be to establish the rights and obligations between the insurers and the insured as evidenced in the insurance contract. Similarly, had the insurers reserved their rights against each other, and then defended and indemnified the insured, the insurers could then bring a declaratory judgment action to determine which insurer was liable. Such action would be based on the reservation of rights agreement.

Since there was no case or controversy between the parties we find that the district court was without jurisdiction to settle this dispute. The judgment of the district court is therefore VACATED and the case is REMANDED with directions to DISMISS the action for want of jurisdiction.

APPENDIX A(ii)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 84-6342-Civ-Roettger

Fort Lauderdale, Florida
October 3, 1986

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

vs.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY.

TRANSCRIPT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW BEFORE THE HONORABLE NORMAN C. ROETTGER, JR.

THE COURT: Well folks, after consulting my tealeaves and astrological charts over the lunch hour, I can hardly wait to hear how it's going to come out. I guess you don't see any humor in that at all.

There are some good things about this case: Interesting case. That's the best part about it. As a judge, you really don't care much about cases unless they're interesting. Like to have a few routine ones just to keep the numbers up, that's just about it. This one is interesting. It always has been. The facts are very simple. In fact, I expected to enter a summary judgment after the hearing and then decided it was an issue of fact. Post-hearing submissions, I guess. In any event, what it boils down to, is this:

Harlon had a group insurance policy;

Harlon had an executive vice-president by the name of David Wall whom obviously the people out there liked and well respected and Mr. Wall unfortunately became ill with cancer;

Harlon had a group insurance policy through their broker JMB Insurance Agency, Chicago; it was Plaintiff Provident Life & Accident Insurance Company;

Mr. Wall stopped working May 17, 1982 because he just didn't feel like it any more. That apparently was about the time he had surgery for cancer, and Harlon continued making full payments to Mr. Wall and also paid to his insurance premiums:

Provident was the short term disability insurance carrier and began paying disability insurance. November of 1982, long term insurance carrier on disability began making those payments. I believe Provident was paying a hundred fifty dollars a month and Harlon paid his salary less than hundred fifty dollar disability payments;

Long-term insurance carrier began making payments in January of '83 but they were backed up to the sixth-month starting point in November 1982 and time passed and then in 1983, beginning January 1, 1983, Wall was no longer paid as an employee and the company had its own insurance disability and he was receiving disability benefit payments. Of course, he had been receiving payments;

Harlon was considering switching their group policy, and in connection with that, in April 18, 1983 Defendant's Group Service Manager Karen Mauro wrote to the International Insurance Consultants, Inc., Mr. Caffarelli, who also happens to be an addressee of a later insurance agency, in any event it's Harlon's insurance broker, Harlon's insurance agent. Mr. Caffarelli's outfit is the same address on North Michigan Avenue in Chicago. April 18th letter sets forth: This letter is to advise you that in the event that Transamerica-Occidental is selected as the insurance carrier for the Harlon Group, the following will apply to any totally disabled employee.

"As long as there is no extension of benefits under the former carrier, Transamerica-Occidental will continue to

provide benefits for a totally disabled employee for a period of 12 months. In the event the employee returns to active employment, coverage will be effective immediately, with no waiting period, and no pre-existing clause will apply.

"If there are any further questions, please let me know."

April 30th, Provident Policy expires. May 1st, Transamerica policy becomes effective. Mr. Wall is still not working.

During this period of time, Mr. Wall would be brought up to date on what, as much as he was able to handle, apparently in his condition through phone calls from his secretary and other persons at Harlon and occassionally if they needed a check signed and no one else was available who was an authorized signatory, they would send a runner out to get him to sign it, but he did not come to the office from May 17, 1982, until his death.

On June 2nd, 1983, this same group service manager for Transamerica sends a letter to the same Mr. Caffarelli, the insurance broker, after Transamerica has become the insurance carrier — and this is Plaintiff's 4; previous letter was Defendant's Exhibit 7 — and it says:

"Dear Ray:

"Please be advised that David Wall and his family are covered under the Harlon group policy with us effective May 1, 1983. Even though Mr. Wall was totally disabled on our effective date, due to the takeover provisions of the policy, we will continue to provide full benefits for him and his dependents as long as the required premium is paid.

"If there are further questions, please feel free to contact me."

Transamerica made payments through the fall of 1983; in fact, they made payments in the amount of $37,000. The insurance broker began to complain, obviously: Mr. Wall was

still alive and more claims are coming in, because of course it's affecting the premium.

I suppose, as an aside, I take it the insurance broker would much rather have had Provident stuck with the payments than Transamerica because that would have no effect on the premium rates on the existing policy; whereas, if it were the other way around, it would have some effect on them because of the experience, loss experience. However, that is not determinative of this.

So finally in January or so, 1984, Transamerica balks and they don't want to pay any more.

Meantime, Mr. Wall has expired in December of 1983.

So there is some strange and bizarre-almost correspondence in evidence about -- the evidence is bizarre. Maybe I just don't understand the insurance aspects of it; but Transamerica wanted Provident to deny responsibility or coverage.

There is a phone call from Mr. Alvin from Transamerica to Ms. Snyder of Provident saying they were paying Mr. Wall's claim but needed a formal denial to get the broker off their back.

Then in February of '84, there's a letter asking Plaintiff to reconsider and make payment.

Unfortunately, all this evidence came in in inverse chronological order, which I find, the time the lawyer wanted to draw a map with South at the top of the page, not programmed that way in life.

26th of January, 1984, Alvin said there was an agreement when they took the policy they pay Wall's claim and the broker began to scream.

January 30th, Transamerica called Provident on one of the original bills which they had sent to Provident in order that Transamerica should make the payment, and then in

February they wanted Provident to reconsider and make the payment.

The statute in Florida gives a rather clear public policy; Protect the insured parties. And I said a rather interesting case. The good thing about it was at least Mr. Wall's family were covered and payments were made, the last one about April of 1984.

When you read the whole code together, in Florida, Chapter 627 with Section 666, setting forth the liability of succeeding insurer and 667, extension of benefits, 667(1) will put that burden on Provident to continue making the disability payments for at least 12 months had there been a total disability to Mr. Wall. 666 would put the burden under (2)(a)3 on Provident for the similar period of one year. Everybody treated Mr. Wall as totally disabled: Provident treated him as disabled; Transamerica considered him disabled; Harlon considered him disabled; long-term disability insurance carrier evidently considered him disabled. It is pretty easy for this Court to find Mr. Wall is disabled. I don't have to get into the situation of whether or not signing when no other authorized signatory is around, even though you can't leave your home and go to work, or consulting on the phone, so to speak, whether that prevents one from being totally disabled. Everybody treated him disabled. I'm going to proceed on that same basis, too. I see no reason to be out of step in my findings. If that's all there was, I don't think there's any doubt about it, Provident would be stuck with the payments under the statute.

The difficulty in the case comes from whether or not Transamerica's altruism, if you will, blundering, if you will, whatever, if their conduct of treating the Wall as covered by the Transamerica policy, whether that avoids the obligation the Court feels is on Provident. I must say it seems difficult to understand, even though Transamerica treated it that way, I don't think when we get into a subsequent fight between carriers, previous carrier and succeeding carrier, that these

letters change the situation. They would if Provident had somehow changed its position to rely on it to its detriment or if that had been true for Harlon or for Wall. But no one was misled other than perhaps Provident. The beneficiary of the Legislature's policy addressed in the insurance code was not harmed, Harlon, the employer, was not harmed; therefore, Transamerica's payments and letters, such as June 2nd, didn't really change anything. If they had caused somebody to change their position in reliance on Transamerica's representations, to the detriment of people who were intended to be covered, benefited by the statute, then rather clearly I think Transamerica would be obviously estopped and I think they would also be liable. I don't see that anything has changed. Therefore, it is the Court's conclusion of law the loss must fall upon Provident.

These constitute my findings of fact and conclusions of law. I won't set them forth in writing because I think they're sufficiently concise, hopefully sufficiently clear, there is no ambiguity about them; and this will comply with the rule because I don't have time to be setting forth written findings, haven't for about ten years, just too busy in this district. Somebody needs or thinks that they need to be clarified or amplified, and I say that confident that they were clear enough for appellate review if that becomes necessary, and I suppose in a fight between insurance companies, it's always anticipatable. If anybody needs any clarification or if they want me to readdress the question in post-trial motions, why, give me the benefit of seeing a transcript of the findings and conclusions. I don't think anybody can squawk at the appellate level if they haven't done so.

Anything else I can take care of now?

I will enter the judgment.

Thank you very much folks. It was an interesting case for an insurance case.

Court is in recess.

* * *

CERFTIFICATE

I, RUDY FOX, HERBY CERTIFY that the foregoing is a true and correct transcription of my original and official stenographic notes.

_____ _____

Dated OFFICIAL COURT REPORTER

APPENDIX A(iii)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5526

D.C. Docket No. 84-6342

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Plaintiff-Appellant, Cross-Appellee,

versus

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court for the Southern District of Florida

---

Before FAY and VANCE, Circuit Judges, and HOFFMAN*, Senior District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby, VACATED; and that these causes be and the same are

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

hereby, REMANDED to said District Court with directions to dismiss the action for want of jurisdiction;

It is further ordered that each party bear their own costs on appeal.

Entered: August 1, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ [Illegible]
Deputy Clerk

[FILED SEP 2 1988]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5526

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Plaintiff-Appellant, Cross-Appellee,

versus

TEANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(SEPTEMBER 26, 1988)

BEFORE: FAY and VANCE, Circuit Judges, and *HOFFMAN, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellee/Cross-Appellant is denied.

ENTERED FOR THE COURT:

/s/ PETER FAY

United States Circuit Judge

ORD-41

---

*Senior District Court Judge for the Eastern District of Virginia sitting by designation.

APPENDIX A(iv)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVEWNTH CIRCUIT.

CASE NO. 87-5526

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Appellant,

vs.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT, PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY

The Appellant, PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY, serves this Supplemental Brief as requested by the Court during oral argument in this matter.

I.

FACTUAL STATEMENT

During the argument in this cause, the Court requested further information on two topics. The first topic specifically raised was that of subject matter jurisdiction (or the existence of a case or controversy). The second question raised related to the actual payments made by any insurer to or on behalf of the individual insured in this case.

In response to the second (or factual) question first, the undersigned indicated a belief at oral argument that PROVIDENT had in fact paid some $37,000 after its policy terminated on April 30, 1983. It is respectfully suggested to this Court that in fact that is not the case. As set forth on

Pages 6-10 of PROVIDENT'S initial brief, TRANSAMERICA from and after May 1, 1983 until Mr. Wall's death paid approximately $37,000 for Mr. Wall's medical bills without any reservation of rights or protest to PROVIDENT or anyone else concerning those bills.

Thereafter, in January of 1984, TRANSAMERICA had agreed with the employer that it would pay futher medical bills if PROVIDENT rejected the claim, which PROVIDENT then did. It was further clear that the basis for the "request" for the rejection by PROVIDENT was not an attempt by TRANSAMERICA to establish a case or controversy, but rather was to appease the insured's broker who felt that the medical bills paid for Mr. Wall were adversely affecting Harlon's insurance rates. It was only after that exchange of correspondence that on or about February 13, 1984, TRANSAMERICA determined that it was not responsible for the medical bills, asking PROVIDENT to reconsider its denial.

Thus, contrary to the information presented to the Court at oral argument, TRANSAMERICA was the only carrier who paid medical bills from May 1, 1983 through Mr. Wall's death on December 10, 1983 or thereafter until the filing of this lawsuit, *by PROVIDENT.*

II.

CASE OR CONTROVERSY QUESTION

To evaluate the question of whether there exists a case or controversy in this declaratory judgment proceeding, it is important to appreciate the factual circumstances of this case. The "dispute" is between two different group health carriers who have a disagreement as to which of them was legally obligated to pay the medical bills of an individual under a group health insurance program. As such, these two companies, PROVIDENT and TRANSAMERICA, had no contractual agreement between themselves, no contractual agreement with the same employer *at the same time,* and no

contractual obligation to any individual employee *at the same time*. They were successive first party (health insurance) carriers who either did or didn't have a contractual obligation to an individual employee member of the group.

From this perspective, and without a prolonged reargument on the merits, it should be noted that in ascertaining how these carriers concluded the extent of their coverage vel non, TRANSAMERICA at all times during Mr. Wall's (the insured employee's) life paid medical bills incurred by him without protest, reservation of rights, non-waiver agreement, or other recognized procedural device acknowledging the existence of any question on their part.[1]

It was only at that point, after Mr. Wall's death, that TRANSAMERICA contacted PROVIDENT for the purpose of obtaining PROVIDENT's "denial" of the claim. The record is clear that that "denial" was not requested or obtained for the purposes of attempting to create a case or controversy in this Court, but was instead requested to appease the broker who was concerned about the effect on the insured's health insurance rates. See PROVIDENT's Initial Brief at 7 - 8. At no time after its policy was terminated, and certainly at no time prior to Mr. Wall's death, did PROVIDENT ever pay for any medical bills incurred after May 1, 1983, agree to pay for any such medical bills, or agree to defer that dispute until after Mr. Wall's death.

This factual predicate is important when the available law is reviewed. If this dispute were one relating to which liability insurer were obligated to provide coverage for Mr. Wall on a liability claim that occurred on a certain day and if the two competing insurers were liability insurers with valid policies in force on that day (a comprehensive liability carrier and an automobile liability carrier for example), the

---

[1]Thus, TRANSAMERICA acted from May 1, 1983 until after Mr. Wall's death in December of 1983, in accordance with its June 2, 1983 letter acknowledging that they would insure Mr. Wall.

law in the United States, and specifically in the Fifth Circuit (binding upon this Court) would be relatively clear.

In *Allstate Insurance Co. v. Employers Liability Assurance Corp.*, 445 F.2d 1278 (Fla. 5th Cir. 1971), this Court's predecessor addressed case or controversy questions in a liability context. The *Allstate* case best sets forth the law that would be binding upon this Court in a liability insurance factual circumstance. There, the Fifth Circuit had to discern which of a variety of liability policies would come into play on secondary coverage for either the owner or the operator of the vehicle in question after the primary limits were exhausted. The issue focused essentially on the relationship of a variety of "other insurance" clauses which the affected policies contained. The Court there gave a traditionally broad definition of the declaratory judgment remedy and then went on to determine whether an amicable, albeit temporary, resolution among the insurers destroyed the coverage case or controversy among these various companies. The primary carrier had paid its full limit of liability and each of the carriers who had a potential excess exposure contributed $50,000 to fund the $250,000 settlement.

The Fifth Circuit commended the procedure utilized by the insurers and determined that it prevented the harmful effect of leaving an insured unprotected while the carriers decided who was to provide the next layer of protection. The Court concluded that the payments of the potentially excess carriers might preclude recovery from the insured or from the injured party (a question that they did not reach), but also felt that the unambiguous agreement among the three competing insurers would not destroy the controversy that existed *among them* as to the coverage applicable on the date of the accident from policies, all of which were applicable on the date of accident to the owner or driver.

This concern for the insured in the liability insurance context has been reiterated by a number of other courts when considering case or controversy questions or declaratory

judgment questions in factual situations similar to that faced by this Court in *Allstate*. For example, in *Continental Casualty Co. v. Employers Commercial Union Insurance Co.*, 476 F.2d 782 (8th Cir. 1973), the dispute centered on the obligation to defend an insured in a personal injury action. Rather than defending the insured and agreeing to debate coverage later, the various carriers refused the defense and brought the declaratory judgment action. The Court expressed its strong disapproval of the practice and suggested that one insurer or the other should have defended the case and only then have taken steps to ascertain the ultimate responsibility between the carriers.

The Tenth Circuit in *Industrial Underwriters Insurance Co. v. P&A Construction Co.*, 382 F.2d 313 (10th Cir. 1967) had jurisdictional concerns similar to the instant court's in a coverage dispute over two liability insurer's obligations to the insured. Recognizing that there was no privity between the insurers and that the obligation of each was to their common insured, the court concluded that there was a justiciable controversy. But see *Travelers Indemnity Co. v. Standard Accident Insurance Co.*, 329 F.2d 329 (7th Cir. 1964); *St. Paul Mercury Insurance Co. v. Huitt*, 336 F.2d 37 (6th Cir. 1964).

It must be noted that a determination that this Court has no jurisdiction would result in the judgment in favor of TRANSAMERICA being vacated, a result which procedurally or substantively is desired by PROVIDENT. Under controlling Fifth Circuit law, it must also be noted this Court would honor, and not penalize, the attempts by a liability carrier to provide a defense for an insured while preserving in some fashion its rights to go after a second liability insurer which refused to honor an obligation to defend, let alone indemnify. To the extent that a dispute between successive health insurers on first party insurance falls into the *Allstate* mold, a constitutional case or controversy would exist and this Court should proceed to a determination on the merits.

On the other hand, this is not a liability case where there exists a continuing duty to defend by all insurers, regardless of who ends up being primary and excess. The relationship of PROVIDENT's coverage to TRANSAMERICA's coverage is not a layered one where one carrier is primary and the other is secondary. Rather it is only a *temporal* relationship where PROVIDENT on April 30, 1983, handed over to TRANSAMERICA a fully active insured who was protected along with his dependents for all purposes under the PROVIDENT policy. TRANSAMERICA accepted that coverage, wrote to the employer that it was accepting the coverage for the individual in question, collected a premium for the individual insured in question, paid all benefits for the individual insured without reservation or objection, and only upon the completion of that contractual obligation raised the dispute with the prior health carrier, PROVIDENT. See generally *Continental Casualty Co. v. Synalloy Corp.*, 667 F. Supp. 1563 (S.D.Ga. 1986), aff'd 826 F.2d 1024 (11th Cir. 1987).

If the *Allstate* case and the others which follow a similar path can be construed to create a case or controversy between any two insurers who disagree as to the provision of benefits to an entity, then this Court has the requisite case or controversy and should proceed to a determination on the merits as requested initially by PROVIDENT in the trial court and again before this Court. On the other hand, there being no coexistence of insurance coverage at any point in time between these two carriers (since they were successive insurers), there being no coextensive duty to defend at all imposed on these two health insurers, and there being no payment made pursuant to a protective non-waiver agreement, reservation of rights, or other procedural document issued by TRANSAMERICA or agreed to by PROVIDENT or the insured, it is respectfully suggested to this Court that this Court has no subject matter jurisdiction because of the absence of a case or controversy. Accordingly, the action in the trial court having been improvidently filed

at the outset, it is urged that this Court reverse and vacate the judgment of the district court on the basis of the absence of any subject matter jurisdiction within this Court's constitutional authority.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 2nd day of May, 1988, to MICHAEL E. WARGO, of Thornton & Hinshaw, Culbertson, Attorneys for Appellee, Suite 720, 19 West Flagler Street, Miami, FL 33130.

FLEMING, O'BRYAN & FLEMING
Attorneys for Appellant.
Post Office Drawer 7028
Fort Lauderdale, FL 33338
(305) 764-3000 & 945-2686

By: _____
Paul R. Regensdorf

APPENDIX A(v)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-5526

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Appellant,

vs.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Appellee.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Appellee/Cross-Appellant,

vs.

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Preference: None

SUPPLEMENTAL BRIEF OF JURISDICTION OF
APPELLEE/CROSS APPELLANT

JEFFREY A. BLAKER
THORNTON & HINSHAW, CULBERTSON
Attorneys for Appellee/
Cross-Appellant
19 West Flagler St., Suite 720
Miami, Florida 33130
Telephone: 305/358-2500

TABLE OF CONTENTS

	Page
Table of Contents	ii.
Table of Citations	iii.
Statement of the Issue	1.
Argument	2.
Certificate of Service	9.

TABLE OF CONTENTS

Cases	Page
Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945)	4
American Home Assurance Company v. Liberty Mutual Insurance Company 475 F.Supp.1169, 1172 (E.D. Pa. 1979)	5,6
Cross v. Occidental Fire & Casualty Co., 347 F.Supp. 342 (W.D. Okl. 1972)	6
Federal Insurance Company v. Michigan Mutual Liability Company, 166 F.Supp. 537,538 (E.D. Pa. 1958)	3
First Federal Savings & Loan Association of Harrison v. Anderson 681 F.2d 528 (8th Cir. 1982)	3
Poe v. Menghini, 339 F.Supp. 986, 990 (D. Kan. 1972)	4
Sears, Roebuck & Company v. American Mutual Liability Insurance Co., 372 F2d 435, 438 (7th Cir. 1967)	8
Seibert v. Baptist, 594 F.2d 423 (5th Cir. 1979)	3
United States Automobile Association v. Royal Globe Insurance Company, 511 F.2d 1094 (10th Cir. 1975	6
Statutes:	
28 U.S.C., §1332	3
28 U.S.C., §2201	*passim*
Fla. Stat. §627.666, .667	*passim*

STATEMENT OF THE ISSUE

WHETHER THE TRIAL COURT HAD JURISDICTION OF A DECLARATORY JUDGMENT ACTION BETWEEN TWO DIVERSE GROUP HEAL INSURERS TO DETERMINE WHICH OF THE TWO WAS LIABLE TO PAY THE MEDICAL EXPENSES OF A GROUP INSURED, WHERE IT WAS UNDISPUTED ONE OF THE TWO INSURERS WAS LIABLE, THE AMOUNT OF SUBMITTED CLAIMS EXCEEDED $10,000, AND THE PARTIES WERE UNCERTAIN AS TO THEIR RIGHTS UNDER THE FLORIDA EXTENSION OF BENEFITS STATUTES AND THE POLICIES OF INSURANCE ISSUED BY THEM.

ARGUMENT

THE TRIAL COURT HAD JURISDICTION OVER A DECLARATORY JUDGMENT ACTION BETWEEN TWO GROUP HEALTH INSURERS WHERE THERE WAS DIVERSITY OF CITIZENSHIP, THE AMOUNT IN CONTROVERSY EXCEEDED $10,000, AND THE CONTROVERSY BETWEEN THE TWO INSURERS WAS ACTUAL, PRESENT, AND IN NO WAY CONTRIVED OR OTHERWISE CONTINGENT.

Pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C., §2201 *et seg.*, PROVIDENT sued TRANSAMERICA for a declaratory decree as to its liabilities under the Florida extension of benefits insurance provisions. Florida Statutes, §627.666, .667 (1986). TRANSAMERICA counterclaimed against PROVIDENT under the Declaratory Judgment Act, seeking a declaration that the benefit monies TRANSAMERICA paid on behalf of David Wall, a group insured, PROVIDENT was liable for. The operative section of the Act states:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C., §2201

However, the Declaratory Judgment statute is strictly remedial and does not provide a separate basis for subject

matter jurisdiction. *First Federal Savings & Loan Association of Harrison v. Anderson,* 681 F.2d 528 (8th Cir. 1982). Recognizing the additional principal that district courts are courts of limited jurisdiction, limited to deciding those cases within Article III, Section 2 of the Constitution, over which an act of Congress has given them jurisdiction, *Seibert v. Baptist,* 594 F.2d 423 (5th Cir. 1979), not only must the procedural requirements of the Declaratory Judgment Act be met, the parties before the court must present either a Federal question or be diverse. *Federal Insurance Company v. Michigan Mutual Liability Company,* 166 F.Supp. 537,538 (E.D. Pa. 1958).

Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1332, the diversity of jurisdiction section of Title 28. PROVIDENT, a Tennessee corporation, and TRANSAMERICA, a California corporation, are diverse parties. As for the amount in controversy, the record is clear that TRANSAMERICA had, at the time suit was filed, paid $37,000 of David Wall's claims, which it contends PROVIDENT should indemnify TRANSAMERICA for. By the time the lawsuit was brought to trial, the amount paid by TRANSAMERICA had increase to over $85,000. Thus, at the time the jurisdiction of the Court was invoked, and at all times up to and including rendition of a judgment, there was more than $10,000 in controversy.

Yet, the jurisdictional inquiry does not end with the satisfaction of the diversity and amount in controversy requirements of 28 U.S.C. §1332. The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461 (1945). The Declaratory Judgment Act statute itself provides that there must be an "actual controversy" for the courts to declare the "rights and relations" of the parties seeking such a declaration. Here, the Court was not presented with a request for an advisory opinion, nor was the Court

asked to decide the case, based upon abstract, hypothetical, or contingent questions. *id.* "A justiciable controversy exists where plaintiffs with a personal stake and interest are arrayed against persons with adverse legal interests in a sufficiently immediate adversary context to warrant declaratory relief." *Poe v. Menghini,* 339 F.Supp. 986, 990 (D.Kan. 1972).

The terms of the policies issued by PROVIDENT and TRANSAMERICA were definite. The provisions of the Florida Statutes regarding liabilities of a prior and succeeding group insurer were at all times in full force and effect. David Wall was entitled to medical benefits. There was no question his claims were not contingent on any happening, bills were continually being incurred, and PROVIDENT and TRANSAMERICA were in dispute as to which of the two under the policies and statutes were liable for David Wall's medical expenses. The controversy between PROVIDENT and TRANSAMERICA was actual, present, and specific. Because one of the two was liable to pay the medical benefits, their legal interests were certainly adverse.

At oral argument, questions were presented directed to the fact, undisputed, that PROVIDENT and TRANSAMERICA had no policy between them and perhaps David Wall, or his estate, should be the one seeking declaratory or other appropriate relief. As with the constitutional case in controversy requirement, "in order to bring an action for declaratory relief, the plaintiffs must meet the requisite standing requirements which are to be strictly construed." *American Home Assurance Company v. Liberty Mutual Insurance Company,* 475 F.Supp. 1169, 1172 (E.D. Pa. 1979). In *American Home,* the trial court dismissed a complaint brought by a contractor's insurer against a sub-contractor's insurer for declaratory judgment. In dismissing the complaint, the court noted the actual controversy in the suit was over an indemnity agreement between the contractor and sub-contractor, which did not create adverse legal

interests between the non-signatory insurers. Citing *Cross v. Occidental Fire & Casualty Company,* 347 F.Supp. 342 (W.D. Okl. 1972), the *American Home* court concluded no actual controversy existed between the insurers. Here, however, the actual dispute is between PROVIDENT and TRANSAMERICA, where in *American Home* the actual dispute was between two contractors and an injured construction worker. The fact that the group insured, Harlan, is not a party to this declaratory judgment action is of no consequence. Both PROVIDENT'S and TRANSAMERICA's interests all arise out of the extended benefits provisions of the Florida statutes, correspondence between PROVIDENT and TRANSAMERICA, and their respective policies of insurance. They both were entitled to seek the remedies the Declaratory Judgment Act provides.

The decision of the Tenth Circuit in *United Services Automobile Association v. Royal Globe Insurance Company,* 511 F.2d 1094 (10th Cir. 1975) is particularly applicable. In *Royal Globe,* an insurer of a rental car driver brought a claim for declaratory judgment against the insurer of a rental car company that the insurance policy of the rental car company covered the driver's liability. The injured party was not joined, nor were the insureds under any of the two policies. The parties agreed one of the two policies were applicable. In affirming a judgment in favor of the driver's insurer, the court remarked on the standing issue:

> At the outset on this appeal, Royal challenges USAA's standing to bring this action. Apparently, this contention was not made at the trial court, and the trial court's findings of fact state as an admitted fact that "this court has jurisdiction of this proceeding." Pointing out that USAA is not a direct beneficiary of the rental contract, Royal invokes the settled and familiar rule that an action by a third party to enforce a contract may be brought only when the third party

> is a direct beneficiary of the contract. See Hawkins v. Mattes, 171 Okl. 186, 41 P.2d 880 (1935); Traders & General Insurance Co. v. Sand Springs Home, 195 Okl. 509, 158 P.2d 1018 (1944); Neal v. Neal, 250 F.2d 885 (10th Cir. 1957). We do not think this rule applicable here, simply because this action is not one to enforce a contract but rather seeks a declaration of the relative rights and duties of USAA and Royal. The subject matter of this suit — the duty of defend and indemnify Friloux in the pending Texas lawsuit — is definite and substantial. Each party has a stake in the outcome, and their interests are adverse. We conclude that USAA has standing to bring this declaratory suit.

511 2d at 1096.

In the present case, the same scenario is presented, except group health benefits are at issue instead of benefits under automobile policies. The "relative rights and duties" of PROVIDENT and TRANSAMERICA were at issue and the parties both rightfully invoked the remedies the Declaratory Judgment Act offers parties who can invoke the jurisdiction of the court.

Finally, even if the requisite jurisdictional hurdle is cleared, the decision of a trial court to grant or deny declaratory relief is with its sound discretion, and only if the decision was erroneous will an appellate court reverse. 475 F. Supp. at 1173, citing *Sears, Roebuck & Company v. American Mutual Liability Insurance Co.*, 372 F.2d 435, 438 (7th Cir. 1967). The dual criteria of clarifying and settling legal relations, and terminating the uncertainty, insecurity, and controversy by affording relief were well served by the trial court's exercising its discretion in rendering a declaratory judgment. By avoiding piecemeal litigation of David Wall against two separate insurers while necessary medical bills went unpaid, the purpose of the Declaratory Judgment Act was furthered.

Because the trial court had diversity jurisdiction over an actual case or controversy, and the parties had the necessary standing, this Court should find the jurisdictional requirements satisfied and as prayed for in the Answer Brief of Appellee/Cross-Appellant, affirm the judgment of the trial court.

THORNTON & HINSHAW, CULBERTSON
Attorneys for Appellee/
Cross Appellant
19 West Flagler Street, Suite 720
Miami, Florida 33130
Telephone: 305/358-2500

By /s/ JEFFREY A. BLAKER
Jeffrey A. Blaker

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct of the foregoing has been mailed to ROBERT D. McINTOSH, ESQ., of the law offices of Fleming, O'Bryan & Fleming, Attorneys for Appellant/Cross-Appellee, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida 33334, this 2 day of May, 1988.

THORNTON & HINSHAW, CULBERTSON
Attorneys for Appellee/
Cross Appellant
19 West Flagler Street, Suite 720
Miami, Florida 33130
Telephone: 305/358-2500

By /s/ JEFFREY A. BLAKER
Jeffrey A. Blaker

APPENDIX A(vi)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 87-5526

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Appellant,

vs.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Appellee.

TRANSAMERICA-OCCIDENTAL LIFE
INSURANCE COMPANY,

Appellee/Cross-Appellant,

vs.

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Appellant/Cross-Appellee.

PETITION FOR REHEARING AND/OR CLARIFICATION

COMES NOW the Defendant/Appellee/Cross-Appellant, TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY, by and through its undersigned counsel, and petitions this Honorable Court for a rehearing in the above-referenced matter, and as grounds therefore would state as follows:

INTRODUCTION

1. This Petition is being made pursuant to Rule 40, Federal Rules of Appellate Procedure, and Rule 40, Rules

of the United States Court of Appeals for the Eleventh Circuit. Transamerica-Occidental Life Insurance Company (hereinafter referred to as "Transamerica") was the Defendant/Counter-plaintiff in the trial Court action and the Appellee/Cross-Appellant in the Appellate Court action. Provident Life & Accident Insurance Company (hereinafter referred to as "Provident") was the Plaintiff/Counter-defendant in the trial Court action and the Appellant/Cross-Appellee in the Appellate Court action. Transamerica contends that this Court has overlooked and/or misapprehended some points of law and/or fact in its opinion rendered on August 1, 1988.

CHRONOLOGY

2. This case was tried in the United States District Court for the Southern District of Florida and a Judgment was subsequently entered against Provident on their claim and in favor of Transamerica on its Counterclaim. Thereafter, oral argument on appeal was had at which time this Court expressed reservations concerning the jurisdiction of the District Court. Apparently, unconvinced by the oral arguments of counsel on jurisdiction, this Court requested jurisdictional briefs on that issue. After reviewing those briefs, this Court rendered its decision on August 1, 1988, indicating that there was no case or controversy between the parties and that therefore, the District Court was without jurisdiction to resolve the dispute. This Court vacated the District Court's Judgment and remanded the cause with directions to dismiss the action for want of jurisdiction.

POINTS OF LAW AND/OR FACT WHICH TRANSAMERICA CONTENDS THIS COURT OVERLOOKED AND/OR MISAPPREHENDED

3. The Appellate Court panel relied on the factual scenario presented by Provident in its Supplemental Brief on jurisdiction rather than relying on the record on appeal to determine those facts. Factually, the record on appeal

would consist of documents and other things admitted into evidence at the time of trial, and the findings of fact rendered by the trial court Judge. It is clear from a review of this Court's opinion that this factual scenario, as presented by counsel for Provident in his jurisdictional Brief, was substituted and relied upon by this Court rather than the record on appeal. It is interesting to note that the author of Provident's Jurisdictional Brief, Paul R. Regensdorf, Esquire, was neither counsel of record for Provident in the underlying action, nor was he present at the trial of that cause. This Court's reliance on the "facts", as presented in Provident's Jurisdictional Brief, specifically with reference to the agreements, and/or lack thereof, between the parties, constitutes error and mandates a rehearing on this matter.

4. This Court in its decision relied heavily on two jurisdictional "defects"; the first being that there was a defect in the parties to this action, and the second being that there was a defect in that there was no legal relationship between the parties on which to base liability. This Court based its opinion on the idea that there was no agreement between the parties and that there was no legal relationship between the parties. Thus, the Court was not satisfied that a common law cause of action could be identified to support the District Court's taking jurisdiction under 28 U.S.C.A. Section 2101 et seq.

First, both Provident and Transamerica had co-existing duties under their policies to pay insurance benefits to the Wall family under their respective group policies issued to the Harlon group. Provident, pursuant to its policy provisions and the Florida Extension of Benefits Statute, Section 627.667, Florida Statutes, had a duty to provide benefits to Mr. Wall, who was found by the trial Court to have been totally disabled on the date of takeover by Transamerica from Provident of the insurance coverage. Transamerica had the duty to provide insurance coverage to Mr. Wall's dependents as of the date of takeover and pursuant to its policy provisions.

Further, although this Court recognized a letter dated June 2, 1983 (erroneously deliniated as a letter dated June 7, 1983 by the author of this Court's opinion), this Court overlooked in its opinion a letter dated April 18, 1983, which was admitted in evidence at the trial and is part of the record on appeal. That letter constitutes an agreement by Transamerica to continue to provide benefits for a totally disabled employee of the Harlon group for a period of twelve months, as long as there was no extension of benefits applicable to the prior carrier, Provident. Since Provident breached this agreement by failing to provide the extended benefits required by F.S. Section 627.667, a controversy between the parties did exist.

5. Another cause of action which could support jurisdiction under 28 U.S.C.A. Section 2201 is unjust enrichment. Unjust enrichment is defined as:

> Doctrine that person shall not be allowed to profit or enrich himself inequitably at another's expense. *American University v. Forbes,* 88 N.H. 17, 183 A. 860, 862. Under this doctrine, a defendant has something of value at the plaintiff's expense under circumstances which impose a legal duty of restitution. *Herrmann v. Gleason,* C.C.A. Mich., 126 F.2d 936, 940. Doctrine permits recovery in certain instances where a person has received from another a benefit retention of which would be unjust. *Seekins v. King,* 66 R.I. 105, 17 A.2d, 869, 871, 134 A.L.R. 1060. Doctrine is not contractual but is equitable in nature. *State v. Martin,* 59 Ariz. 438, 130 P.2d 48,52.
>
> "Unjust enrichment" of a person occurs when he has and retains money or benefits which in justice and equity belong to another. *Hummel v. Hummel,* 133 Ohio St. 520, 14 NE 2d 923, 927. Thus, one who has conferred a benefit upon another solely because of a

basic mistake of fact induced by a non-disclosure is entitled to restitution on above doctrine. *Conkling's Estate v. Champlin,* 193 Okl. 79, 141 P.2d, 569, 570. Black's Law Dictionary, Revised 4th Edition (1968), P.1705.

Because of Provident's contention that neither the extension of benefits provision of their policy, nor the extension of benefits provision of the Florida Statutes applied in the case of Mr. Wall, Transamerica provided insurance benefits to Mr. Wall under their policy. Provident has been unjustly enriched in that it was their duty, as found by the Trial Court Judge below, to provide those benefits. Transamerica has been damaged in equity and thus, the doctrine of unjust enrichment provides the common law cause of action requested by this Court to support jurisdiction under 28 U.S.C.A. Section 2201.

6. Additionally, Transamerica requests clarification of this Court's opinion concerning the rights of the parties to amend their respective Complaints for Declaratory Relief to cure the jurisdictional defects identified by this Court in its opinion.

WHEREFORE, Transamerica respectfully requests this Court grant its Petition for Rehearing in that this Court has overlooked and/or misapprehended particular points of law and/or fact which mandate a rehearing. Alternatively, Transamerica requests a clarification of the Opinion concerning its rights to amend their Counterclaim for Declaratory Relief to cure the alleged jurisdictional defects identified by this Court in its Opinion dated August 1, 1988.

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Rehearing was mailed this 18 day of August, 1988, to Maria Sperando, Esq., Fleming, O'Bryan & Fleming, 1415 East Sunrise Boulevard, Fort Lauderdale, Florida 33334.

THORNTON & HINSHAW, CULBERTSON
Attorneys for Apellee/
Cross-Appellant
19 West Flagler Street
720 Biscayne Building
Miami, Florida 33130
Telephone: (305) 358-2500

By: /s/ MICHAEL E. WARGO
MICHAEL E. WARGO

Pro.Pet1-6

Transamerica Corporation (Cal.) [Del.]*
Coast Service Company (Cal.)*
FSJ Holding Company, Inc. [Del.]*
Inter-America Corporation (Cal.)*
LMS Company (Cal.)*
Mortgage Corporation of America (Cal.)*
Pyramid Insurance Company of Bermuda, Inc. (Berm.)
TAFEX Systems Corporation (Cal.) [Del.]*
TCS, Inc. (Del.)*
Trans International Entitles, Inc. (Del.)*
Transamerica Corporation—Oregon (Cal.) [Ore.]*
Transamerica Equipment Leasing Company, Inc. (Cal.) [Del.]*
Transamerica Financial Corporation (Cal.) [Del.]*
Transamerica Homes, Inc. (Del.)*
Transamerica Information Services Corporation (Cal.) [Del.]*
Transamerica Insurance Corporation of California (Cal.)
Transamerica International Holdings, Inc. (Del.)*
Transamerica International, Ltd. (Can.)*
Transamerica Interway, Inc. (N.Y.) [Del.]*
Transamerica Investment Services, Inc. (Cal.) [Del.]*
Transamerica Land Capital, Inc. (Cal.)*
Transamerica Overseas Finance Corporation, N.V. (Neth.)*
Transamerica Real Estate Tax Service (Cal.)*
Transamerica Realty Investment Corporation (Del.)*
Transamerica Realty Services, Inc. (Del.)*
Transamerica Systems Corporation (N.J.) [Del.]*
Transamerica Commercial Finance Corporation (Del.)
Transamerica Title Insurance Company (Cal.)
Transamerica Title Insurance Company of New York (N.Y.)
Arbor Life Insurance Company (Ariz.)
Transamerica Annuity Service Corporation (N. Mex.)*
Transamerica Advisors, Inc. (Cal.)*
Transamerica International Insurance Services, Inc. (Cal.) [Del.] 85%*
Occidental International Holdings, N.V. (Neth.)*
Regency Life Assurance Company Ltd. (U.K.)

Transamerica Occidental Life Insurance Company (Cal.)
First Transamerica Life Insurance Company (N.Y.)
Transamerica Assurance Company (Col.)
Transamerica International Insurance Services, Inc. (Cal.) [Del.] 15%*
Transamerica Life Insurance and Annuity Company (Cal.)
Transamerica Life Insurance Company of Canada (Can.)
Transamerica Occidental Life Insurance Company of Illinois (Ill.)
Plaza Insurance Sales, Inc. (Cal.)*
Transamerica Consultants, Inc. (Cal.)*
Transamerica Financial Resources, Inc. (Cal.) [Del.]*
Transamerica Insurance Group (Cal.)
Transamerica Insurance Company (Cal.)
Transamerica Premier Insurance Company (Cal.)
Transamerica Specialty Insurance Company (Cal.)
Countrywide Insurance Company (Cal.)
Transamerica Insurance Company of Michigan (Mich.)
Transamerica Indemnity Company (Cal.)
Transamerica Insurance Company of Texas (Tex.)
Transamerica Insurance Corporation of America (Mich.)
Countrywide Corporation (Texas)*
Industrial County Mutual Insurance Company (Tex.)*
Transamerica Insurance Company of New York (N.Y.)
Fairmont Insurance Company (Cal.)
Chilton Insurance Company (Tex.)
Surety Management, Inc. (Col.)*
Continental Surety & Fidelity Insurance Company (Col.)
Transamerica Lloyds Insurance Company (Tex.)**
Transamerica Reinsurance Company (Neb.)
River Thames Insurance Company Ltd. (U.K.)
Transamerica Financial Systems & Concepts, Inc. (Cal.)*
Crown Valley Insurance Agency, Inc. (Agency)*
Fairmont Leasing Corporation (Cal.)*
FLC Premium Financial Company (Cal.)*
Fairmont Information Management Services, Inc. (Cal.)
F.L.M. Insurance Agency, Inc. (Cal.)*

Infantino & Company (Cal.)*
South Coast Surety General Agency (Cal.)
Alamos Corporation Bond & Insurance Services (Cal.)*
Fairmont Printing Company (Cal.)*
Transamerica Insurance Management, Inc. (Cal.)*
Transamerica Insurance Securities Sales Corporation (Md.)*
Transamerica Products, Inc. (Cal.)*
Transamerica Products, I, Inc. (Cal.)*
Transamerica Products, II, Inc. (Cal.)*
Transamerica Cash Reserve (Cal.) [Md.]*#
Transamerica Income Shares (Cal.) [Md.]*#

NOTE: All corporations 100% owned except as indicated; state of domicile indicated in parenthesis ( ); state of incorporation where different from commercial domicile, indicated between brackets [ ].

* Not an Insurance Company

\# Controlled by Management Contract

\#\# Controlled by Trust Agreement

(2)

Supreme Court, U.S.
FILED
FEB 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1237

In The

Supreme Court of the United States

October Term, 1988

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

ROBERT D. MCINTOSH
PAUL R. REGENSDORF
MARIA P. SPERANDO

FLEMING, O'BRYAN & FLEMING
Attorneys for Respondent
500 East Broward Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338
(305) 764-3000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13p

QUESTION PRESENTED FOR REVIEW

Is a justiciable case or controversy present when a successor group insurer voluntarily pays the medical expenses of a group insured without obtaining a protective non-waiver agreement, reservation of rights, or other procedural protection against the prior insurer on the group risk and then sues the prior carrier (but not the insured) for repayment of the money it has voluntarily paid on behalf of the group insured.

LIST OF ALL PARTIES

The parties to this proceeding are properly listed in the style and caption of this case. A list of Transamerica-Occidental Life Insurance Company's related entities has been included in its Petition at page App. A(iv)-25. Transamerica-Occidental Life Insurance Company will be referred to in this Brief in Opposition as "Transamerica." A list of Provident Life & Accident Insurance Company's related corporations is included on page 1 of the Appendix to this Brief.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI 3

TABLE OF AUTHORITIES

Page

CASES:

Allstate Insurance Co. v. Employers Liability Assurance Corp., 445 F.2d 1278 (5th Cir. 1971) 5

Industrial Underwriters Insurance Co. v. P & A Construction Co., 382 F.2d 313 (10th Cir. 1967) 5

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 6

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 5

United Services Automobile Ass'n v. Royal-Globe Insurance Co., 511 F.2d 1094 (10th Cir. 1975) ... 3, 4, 6

RULES:

Rule 17 of the Supreme Court Rules 5

MISCELLANEOUS:

Harlan, "Manning the Dikes," 13 Record NYCBA 541 (1958) 6

No. 88-1237

In The

Supreme Court of the United States

October Term, 1988

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

PROVIDENT LIFE & ACCIDENT COMPANY (hereinafter referred to as "Provident"), by and through its undersigned attorneys, files this its Brief in Opposition to Writ of Certiorari:

A. STATEMENT OF THE CASE

Transamerica's Statement of the Case essentially presents the procedural and factual background to this Court, with the following important exceptions:

1. Transamerica and Provident were not insurers who simultaneously had coverage for the same risk. Instead, Provident's policy covered the group health risk until April 30, 1983, and Transamerica's policy began its coverage on May 1, 1983.

2. Transamerica voluntarily began to pay the medical expenses of the employee upon the effective date of its policy and continued to do so without any reservation of rights, non-waiver agreement or other procedural agreement with Provident (or the insured) which attempted or purported to create or preserve the existence of a dispute between the parties.

3. In fact, Transamerica, by letter dated June 2, 1983, contacted the agent for the group and informed the group that it was covering the employee in question for his medical expenses.

4. In addition to not obtaining a reservation of rights or non-waiver agreement with the interested individuals and entities, Transamerica also did not commence any declaratory judgment action at any time when the medical expense payments were still accruing. Rather, the declaratory judgment action and counterclaim were not commenced until after Transamerica voluntarily had made all payments.

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI

Transamerica's sole basis for jurisdiction is a claimed direct conflict of the decision below with the decision of the Tenth Circuit Court of Appeals in *United States Automobile Ass'n v. Royal-Globe Insurance Co.*, 511 F.2d 1094 (10th Cir. 1975). (For uniformity with Transamerica's argument, this case will be referred to hereinafter as "*Royal-Globe*"). While there are certain limited similarities between *Royal-Globe* and the decision before this Court, it is respectfully suggested to this Court that the cases are not in jurisdictional or any other sort of conflict. To ascertain the absence of a conflict, the circumstances of *Royal-Globe* must be briefly presented.

In *Royal-Globe*, the Tenth Circuit faced a case in which the dispute was between two liability insurers over who provided primary liability insurance coverage to the driver of a rental car, as well as the obligation to defend. The dispute was between the driver's own personal coverage and the coverage provided by the rental car's insurer to the driver of such cars. The significant difference between that case and this one is that in *Royal-Globe* one of the insurers brought a declaratory judgment action *prior* to when the defense effort had concluded and prior to when any obligation to indemnify financially was necessary. Thus, neither insurer voluntarily provided the coverage defense and the indemnity only to attempt to bring a declaratory judgment action *after* the fact of payment.

Based upon that prompt action to ascertain the insurers' rights, the Tenth Circuit determined that "each party *has* a stake in the outcome, and their interests are adverse." *Id.* at 1096 (emphasis added).

The facts and circumstances before the Eleventh Circuit in this case are very different. First, the parties before this Court were successive health insurance carriers and not simultaneous liability insurers who had to determine which company would defend (and ultimately indemnify) the driver as a result of an automobile accident.

Second, the plaintiff in *Royal-Globe*, unlike Transamerica here, sought a prompt determination of its rights and obligations *before* it found itself in a position where it had already voluntarily defended the lawsuit and paid an indemnity obligation. Transamerica paid all of the employee's medical expenses, confirmed by letter that the employee was covered by its group health plan, made no effort to obtain an agreement from Provident to this procedure, and challenged its obligation to pay only after the payment was a *fait accomplit*.

Transamerica's statement at page 13 of its Brief that the decision of the Eleventh Circuit will create some *in terrorem* concerns in our litigious society is without merit. As the court below indicated, there are ample vehicles available to companies such as Transamerica to allow them to preserve any dispute that they may have with prior insurers. Notwithstanding the availability of those devices, however, Transamerica did nothing except voluntarily pay the medical bills as they became due.

Thus, as the decision and the cases cited therein make clear, Transamerica could have (a) filed an action at the outset, joining all interested parties and litigated the dispute before it became moot through voluntary payment; or (b) obtained a full reservation of rights or non-waiver agreement from Provident and the insured prior

to making its voluntary payments, thereby preserving to a later date its right to dispute its obligation as the successor group insurer. *See Allstate Insurance Co. v. Employers Liability Assurance Corp.*, 445 F.2d 1278 (5th Cir. 1971); *Industrial Underwriters Insurance Co. v. P & A Construction Co.*, 382 F.2d 313 (10th Cir. 1967).

To be sure, a case or controversy could also have been preserved by denying all responsibility to the employee with respect to health benefits, leaving the ill employee without medical insurance. To suggest, however, that the decision of the 11th Circuit compels such a result is a broad misreading of the decision of the court below.

Rule 17 of the Supreme Court Rules provides, in pertinent part, as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> > (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . .

" 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). The Supreme Court does not sit to satisfy a scholarly interest in intellectually interesting problems nor for the benefit of particular litigants. *Id.*

The mere allegation of a conflict between federal circuits is insufficient for the granting of a writ of certiorari. There must be "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). According to Justice Harlan,

> nothing short of a difference of decision between two Courts of Appeals . . . will suffice to satisfy the 'conflict' rule . . . . Moreover, differences between the Courts of Appeal in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved . . . . [A] conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be resolved.

Harlan, "Manning the Dikes," 13 Record NYCBA 541, 552 (1958).

From the above, it is respectfully suggested to this Court that while the *Royal-Globe* decision and the decision of the Eleventh Circuit below are not identical, they are not in jurisdictional conflict. Each involves a dispute between two insurers and one finds that no case or controversy exists while the other finds that constitutional jurisdiction does exist. Those limited facts do not create jurisdictional conflict, however, because the totality of the circumstances reflected in the two decisions demonstrates that the procedural posture of *Royal-Globe* was completely distinguishable from that facing the Eleventh Circuit in this case. Whatever case or controversy may have existed at one time, by the time the action was commenced

below, Transamerica had lost its jurisdictional base in federal court.

Accordingly, Provident respectfully urges that this Court deny the Petition for Writ of Certiorari presented in this case.

Respectfully submitted,

FLEMING, O'BRYAN & FLEMING
Counsel for Respondent
500 East Broward Boulevard
Post Office Drawer 7028
Fort Lauderdale, Florida 33338
(305) 764-3000

Of Counsel:

ROBERT D. MCINTOSH
PAUL R. REGENSDORF
MARIA P. SPERANDO

APPENDIX

Provident is a wholly-owned subsidiary of Provident Life Capital Corporation, which is a wholly-owned subsidiary of Provident Life and Accident Insurance Company of America.

The following are subsidiaries of or affiliated with Provident:

Provident Life and Casualty Insurance Company (Tennessee) *

Provident National Assurance Company (Tennessee) *

Provident Marketing Corporation (Tennessee) *

Health Point Corporation (Tennessee) *

Health Point Preferred, Inc. (North Carolina)

Health Point Preferred, Inc. (Tennessee)

Health Point Preferred, Inc. (Maryland)

Halcyon, Ltd. (Bermuda) *

Dental One, Inc. (Georgia) *

Dental Management Services, Inc. (Delaware)

Dental Care of America, Inc. (Delaware)

DMS of Carolina, Inc. (North Carolina)

Dental Plan of America, Inc. (Maryland)

---

* These corporations are wholly-owned subsidiaries of Provident.

Associated Reinsurance Corporation Company (Georgia)

Associated Intermediaries, Inc. (Georgia)

Associated Intermediaries – South Carolina, Inc. (South Carolina)

U.S. Facultative Management Corp. (New York)

Provident Properties, Inc. (Tennessee)

G.S.E.C., Inc. (Texas)